IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

No. 140

NATHAN WILLNER,

Petitioner,

vs.

COMMITTEE ON CHARACTER AND FITNESS, APPELLATE DIVISION OF THE SUPREME COURT OF THE STATE OF NEW YORK, FIRST JUDICIAL DEPARTMENT,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

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No. 995

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COMMITTEE ON CHARACTER AND FITNESS, APPELLATE DIVISION OF THE SUPREME COURT OF THE STATE OF NEW YORK, FIRST JUDICIAL DEPARTMENT,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

The Committee on Character and Fitness, Appellate Division of the Supreme Court of the State of New York, First Judicial Department, opposes the granting of the petition for certiorari.

The Opinion Below

The New York Court of Appeals wrote no opinion. 11 N. Y. 2d 866. The Appellate Division, First Department, wrote no opinion. 13 A. D. 2d 956.

Jurisdiction

The jurisdiction of this Court is invoked by the petitioner (Br., p. 2) under Title 28, United States Code, § 1257, subdivision 3.

The Question Presented

The question which petitioner seeks to present is whether, more than 21 years after he had been first denied admission to membership on the New York Bar by reason of the Committee's refusal to report in accordance with New York Judiciary Law, § 90 (then § 88), that it was satisfied that he "possesses the character and fitness required for an attorney and counsellor-at-law", he is entitled to assert that the Committee's action was taken arbitrarily and without regard to due process requirements.

The question is narrowed considerably since the record does not show: that the petitioner, within the period required by New York Civil Practice Act, Article 78, § 1286, began proceedings to review the Committee's original determination; or that in his appearances then before the Committee, or otherwise, the petitioner had asked that he be "confronted" by the persons he now labels as his accusers; or that he was then denied any information by the Committee about such charges. (See the Brief filed by the New York Attorney General in opposition to the petitioner's 1955 petition for certiorari.)

Moreover, the order sought to be reviewed merely denies petitioner an opportunity to *renew* his application for admission.

Prior Judicial History

Certiorari was denied to this petitioner in 1955 (348 U. S. 955), after the New York Court of Appeals (307 N. Y. 943, rearg. den. 307 N. Y. 944), had denied him leave to appeal from a First Department order (283 App. Div. 871), which had previously denied petitioner permision to file an application *de novo* for admission to the Bar.

Statement

(1)

In February, 1937 petitioner filed with the Committee his completed questionnaire. On three separate occasions between April 4, 1937 and October 31, 1938, he was examined by the Committee. On October 31, 1938, the Committee reported unanimously, through its ten members, that it could not certify that petitioner possessed the requisite character and fitness for admission to the Bar.

Between November, 1939 and February, 1948, the Appellate Division, First Department, denied six motions made by the petitioner seeking reconsideration of his application by the Committee.

On February 9, 1948, the Appellate Division granted petitioner's motion for reconsideration. It referred the matter to the Committee for a rehearing. Petitioner then appeared before the Committee on two separate occasions. On June 19, 1950, all ten members of the Committee signed a report adhering to the determination made in the Committee's 1938 report.

On May 18, 1954, the Appellate Division entered an order resettling an order of April 17, 1954 denying permission to the petitioner to file his application *de novo*. It also formally denied his application for admission to the Bar. This was done at petitioner's request so that he could apply to the Court of Appeals from such order of denial.

The New York Court of Appeals, when it denied leave to appeal had before it all papers filed with the Appellate Division. See 307 N. Y. 943, 944. Then this Court denied certiorari (348 U. S. 955).

(2)

On November 1, 1960, the Appellate Division denied petitioner's further application for admission *de novo* (12 A. D. 2d 452).

(3)

On June 29, 1961, the Appellate Division denied petitioner's application for leave to file an application for admission pursuant to Rule 1(e) of the Rules of Civil Practice (13 A. D. 2d 956). That Rule requires an applicant who previously has failed to receive a certificate of good character, to obtain the Appellate Division's written consent to renewal of his application for admission in that or any other Appellate Division.

On September 21, 1961, the Appellate Division denied leave to the petitioner to appeal from its June 29, 1961 order (14 A. D. 2d 672). On January 23, 1962, the Court of Appeals granted leave to appeal from such order. On April 5, 1962, the Court of Appeals affirmed the June 29, 1961 order appealed from (11 N. Y. 2d 866). On April 26, 1962, the Court of Appeals amended its remittitur to indicate: that it had passed upon the constitutional questions petitioner presented and that it had held that he had not been denied due process (Pet. Appendix A).

ARGUMENT

No substantial federal question is presented by the petition. It should be denied, particularly since the petitioner is again seeking to renew an application for admission to the New York Bar, this Court having previously refused to review, by certiorari, a prior denial of an application by petitioner to renew his application for such admission.

Since this Court refused to grant certiorari to review a similar ruling by the New York Courts in 1955, we do not assume that it will now act differently.

The only argument urged by the petitioner for now granting certiorari is that the decisions by this Court in *Koenigsberg* v. *State Bar*, 353 U. S. 252 (1956) and in

Cohen v. *Hurley*, 366 U. S. 117 (1960), indicate that he was deprived of due process in not being afforded an opportunity to confront persons who, he alleges, furnished information to the Committee which led to the rejection of his original application for admission.

The record does not indicate that he preserved, by request or objection, the right to urge any such deprivation of constitutional right or that the Committee's determination rested upon such information. Nor do the cases cited by petitioner hold that he was constitutionally entitled to confrontation of such witnesses before the Committee.

In the first *Koenigsberg* case (*supra*), this Court found that there had been a denial of due process because the evidence before the California committee did not rationally support the two grounds upon which that committee had relied in rejecting Koenigsberg's application for admission (353 U. S. 252, 262). In *Cohen* v. *Hurley*, *supra*, this Court held that disbarment of an attorney, by reason of his refusal to cooperate in a State court's efforts to explore unethical conduct, and without any independent evidence of wrongdoing on his part, was not irrational or arbitrary, and did not deprive him of due process of law, contrary to the Fourteenth Amendment. Both cases stem from the "undeniably correct premise that a State may not arbitrarily refuse a person permission to practice law" (366 U. S. 117, 122-123).

But the petitioner's record in this case contains no basis for labeling the Committee's action in 1938 and 1950 as arbitrary in refusing to certify petitioner's character. Nor does the refusal of the New York Courts to permit the petitioner to renew his application for admission present any federal question.

CONCLUSION

The petition for certiorari should be denied.

Dated: New York, N. Y., June 1, 1962.

Respectfully submitted,

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